Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

EDNA AYERS, ADMINISTRATRIX OF THE ESTATE OF ROY L. HARDIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

G. MURRAY TURNER
Counsel of Record
MULHALL TURNER COOMBS & MALONE
440 South Seventh Street
Suite 300
Louisville, Kentucky 40203
(502) 584-6375

WILLIAM B. HOFFMAN
PAUL A. CASI, II
HOFFMAN & CASI
440 South Seventh Street
Suite 100
Louisville, Kentucky 40203
(502) 584-0404

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The court of appeals held that the petitioner's claims were subject to admiralty jurisdiction and were not properly brought under the Federal Tort Claims Act. The court affirmed the district court's dismissal of the complaint and amended complaint with prejudice for lack of jurisdiction as the statute of limitations had then expired for claims brought under the Suits in Admiralty Act, 46 U.S.C. § 740, *et seq.* The court of appeals held that the requirements for admiralty jurisdiction were met under the test set forth by this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

The question presented is whether admiralty jurisdiction is appropriate when the injury or damage is not caused by or is not directly related to the activities of a vessel. The more narrow question presented is whether admiralty jurisdiction should be extended to a swimming and drowning incident down river where the drowning was not caused by a vessel but was caused by the discharge and release of water from a lock causing down river turbulence.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The parties are Edna Ayers, Administratrix of the Estate of Roy L. Hardin, petitioner, and the United States of America, respondent. Petitioner is not a subsidiary or affiliate of a publicly owned corporation. No non-party, publicly-owned corporation has a financial interest in the outcome.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion, granting respondent's motion to dismiss for lack of jurisdiction (App. 15) is published at 2000 WL 33177227 (E.D. Ky.). The court of appeals' opinion affirming (App. 1) is published at 277 F.3d 821 (6th Cir. 2002). There were no petitions for rehearing or for *en banc* review.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on January 17, 2002. (Opinion, App. 1; Judgment App. 14.) This petition has been filed within ninety (90) days of the judgment of the court of appeals, pursuant to Supreme Court Rule 13.1. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 742 entitled "Suits in Admiralty by or Against Vessels or Cargoes of the United States" provides in pertinent part:

> In cases where if such vessels were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in Section (1) of this Act. Such suits shall be brought in the district of the United States for the district in which the party so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

STATEMENT OF THE CASE

This action arises from Roy L. Hardin's death by drowning in an area below Lock and Dam No. 2 on the Kentucky River in or near Lockport, Kentucky on August 3, 1997. Lock and Dam No. 2 was owned and operated by the United States Department of the Army – United States Army Corps of Engineers.

On the day in question, twenty to thirty persons were swimming down river from the lock and dam. It was well known to the Corp of Engineers and its lock operators that the area below the lock and dam was used for recreational purposes. Roy L. Hardin and a friend were swimming across the Kentucky River to join other friends at a "beach area" on the Owen County side of the river. While they were swimming across the river, approximately one hundred yards down river from the discharge end of the lock, the lockmaster began locking through

two pleasure boats. The process of locking through the boats, i.e., opening the lock at the down stream discharge end and releasing water, caused turbulence down river and pulled Roy Hardin and his friend underwater. The friend eventually freed himself from the turbulent undertow. Unfortunately, after being pulled underwater once or twice, Roy Hardin did not resurface and drowned.

The Petitioner submitted a Standard Form 95 – Federal Tort Claim (Wrongful Death) to the appropriate and responsible federal agency, the United States Department of the Army – United States Army Corps of Engineers on June 28, 1999. An Amended Standard Form 95, which was personally signed by Edna Ayers as the Administratrix of the Estate of Roy Hardin, was filed on July 29, 1999.

When the Corps of Engineers failed to make a final disposition of the claim within the prescribed six-month period under the Federal Tort Claims act, the Petitioner timely filed a complaint in the United States District Court for the Eastern District of Kentucky, Frankfort Division, on February 11, 2000.

On April 20, 2000, the United States filed a motion to dismiss, alleging the claims were subject to admiralty jurisdiction and were not properly brought under the Federal Tort Claims Act. The United States alleged that the district court had no jurisdiction since the two-year statute of limitations had expired for claims brought under the Suits in Admiralty Act.

On June 7, 2000, petitioner filed an amended complaint in the district court alleging, *inter alia*, alternative jurisdiction under the Suits in Admiralty Act. Jurisdiction was proper pursuant to 28 U.S.C. § 1346(b) for claims

under the Federal Tort Claims Act. In the alternative, jurisdiction was proper under 28 U.S.C. § 1331 for claims arising under the Suits in Admiralty Act, 46 U.S.C. §§ 740, *et seq.*

The district court dismissed the complaint and amended complaint in a memorandum opinion and order and judgment on June 28, 2000. An appeal was taken to the Sixth Circuit Court of Appeals, which affirmed the district court in an opinion and judgment entered on January 17, 2002. (The court of appeals had jurisdiction under 28 U.S.C. § 1291.)

The court of appeals erroneously held that the petitioner's claims were governed by the Suits in Admiralty Act and not by the Federal Tort Claims Act despite the fact that incidents involving swimmers on navigable waters are not subject to admiralty jurisdiction unless the injuries were caused by a vessel or unless the vessel was directly involved in the occurrence of the tort.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the case presents an issue of first impression in the federal courts. There are no other reported cases finding that admiralty jurisdiction is proper with factual circumstances substantially similar to this case, i.e., a case where a swimmer was drowned down river due to an allegedly improper release of water from a lock or dam and where the drowning was not caused by a vessel and was not

directly related to the activities of a vessel. In contrast, numerous federal cases have found admiralty jurisdiction to be appropriate where injuries are caused or arise from or are directly related to the activities of a vessel. The court of appeals has decided an important question of federal law that has not been, but should be settled by this Court – whether admiralty jurisdiction is proper when the injuries are not caused by a vessel and the injuries do not directly arise from the activities of a vessel.

Second, the court of appeals has decided an important federal question in a way that conflicts with decisions of this Court. The common thread in every decision in this Court finding admiralty jurisdiction in modern times is the direct involvement of a vessel in causing the injury or damage. This Court has also long recognized that incidents involving swimmers on navigable waterways are not subject to admiralty jurisdiction unless the injuries or damage were caused by a vessel. The court of appeals' decision demonstrates that this Court's test for admiralty jurisdiction needs further clarification. The question of admiralty jurisdiction continues to plague courts and parties, especially in unusual cases. In close or unusual cases, a litigant can easily err in deciding whether a particular matter involving the United States falls within the Court's admiralty jurisdiction. If suit is filed against the United States under the wrong statute, such as the Federal Tort Claims Act instead of the Suits in Admiralty Act, the claim can be held to be barred by the statute of limitations.

Immediately prior to drowning, Roy Hardin was swimming in the Kentucky River. He was not on a vessel

prior to drowning. He was not in or near the lock at the time of his drowning. He may have been as far as nine hundred feet or three hundred yards down river when the lockmaster released the water. The pleasure boats being locked through did not cause or pose a hazard to Roy Hardin or any of the other persons swimming down river. The gravamen of the complaint and amended complaint was that the locking was done without regard for the safety of swimmers down river, including Roy Hardin. The vessels did not cause the drowning, and the vessels' activities did not directly lead to the drowning.

Since the early 1970s, this Court has had the opportunity to address the issue of admiralty jurisdiction on four occasions. The common thread in every decision finding admiralty jurisdiction is a vessel causing injury or damage. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 529 (1995) (crane on a barge drove piles into a river bed above a tunnel allegedly causing damage to the tunnel and flooding; the Court specifically held that the barge was a vessel); *Sisson v. Ruby*, 497 U.S. 358, 360 (1990) (fire on a boat caused damage to surrounding vessels and a marina); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) (two pleasure boats collided on a navigable waterway).

In contrast, in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), where the Court found that a sinking plane in navigable waters did not give rise to a claim in admiralty, no vessel was involved. Indeed, there was no allegation that a vessel was involved. The Court in *Grubart* pointed to this very distinction. *Grubart*, 513 U.S. at 542 (ordinarily "every tort involving a vessel on navigable water will fall within the scope of admiralty

jurisdiction," but the Court has rejected "a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engaged in an activity far removed from anything traditionally maritime"). *See also Sisson v. Ruby*, 497 U.S. 358, 369-70 (1990) (Scalia, J., concurring) ("Our decision in *Executive Jet* could be understood as resting on the quite simple ground that the tort did not involve a vessel, which had traditionally been thought required by the leading scholars in the field . . . ").

This Court has also long recognized that incidents involving swimmers on navigable waters are not subject to admiralty jurisdiction unless the injuries were caused by a vessel. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 255 (1972) (cases involving swimmers being injured by other swimmers or by submerged objects on the bottom of the water lack a sufficient nexus to maritime commerce and are not properly subject to admiralty jurisdiction); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 n. 4 (1982) (disapproving federal decisions sustaining admiralty jurisdiction over claims by swimmers for injuries caused by other swimmers or submerged objects in shallow waters near shore); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 540 (1995) (the relationship between swimming and maritime commerce is too "attenuated" to support admiralty jurisdiction).

The test this Court has adopted to determine whether admiralty jurisdiction is appropriate has often been referred to as the "location plus" or "location plus connection" test. The location part of the test is usually satisfied when a vessel-related tort is consummated or completed on navigable waters. In determining whether there is a sufficient nexus or connection to maritime

commerce or activities, the Court has held that lower federal courts must:

> (1) assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce; and
>
> (2) assess whether the general character giving rise to the incident shows a substantial relationship to traditional maritime activities or commerce.

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995).

In this case, the court of appeals held that the locality prong of the test was satisfied since Roy Hardin drowned in a navigable waterway, and the instrumentality that caused the drowning (the lock) was located in a navigable waterway. Thus, the court of appeals held that the location part of the test was satisfied despite the fact that the vessels being locked through the dam did not cause the drowning and despite the fact that the there was no direct relationship between the activities of the vessels and the drowning. The boats within the lock were not charged by any party with tortious conduct nor did they have any control over how the Corps of Engineers' lock operator performed his duties.

This Court should grant certiorari to decide whether the location test requires the direct involvement of a vessel. In modern times, this Court has never held that admiralty jurisdiction was appropriate in a case where the injuries or damage were not caused by a vessel. The

Court has also repeatedly indicated (or at least suggested) that the tort should be caused by a vessel. In *Grubart*, the majority indicated that "ordinarily every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction . . . " *Grubart, supra,* at 543. The majority also indicated that it was "customary practice in seeing jurisdiction as the norm when the tort *originated with a vessel in navigable waters*" *Id.* at 547 (emphasis added). In *Sisson v. Ruby*, 497 U.S. 358, 373 (1990) Justice Scalia stated in his concurrence: "The sensible rule to be drawn from our cases, including *Executive Jet* and *Foremost* is that a tort occurring on a vessel conducting normal maritime activities in navigable waters – that is, as a practical matter, every tort occurring on a vessel in navigable waters – falls within the admiralty jurisdiction of the federal court." Justice Scalia further stated: "I would hold that a wrong which occurs (1) in navigable waters, (2) on a vessel, and (3) while that vessel is engaged in a traditional maritime activity, bears a significant relationship to traditional maritime activity." *Id.* at 374. *See also Grubart*, 513 U.S. at 555 (Thomas, J., concurring) (indicating that "district courts should ask if the tort occurred on a vessel on the navigable waters").

Furthermore, under the "connection" test, the Court needs to clarify whether district courts should consider the activities of the plaintiff or whether they should simply focus on the activities of the tortfeasor. The court of appeals determined that the incident involved had a potentially (possibly) disruptive impact on maritime commerce because any attempt to rescue a drowning swimmer or to search for a body could potentially disrupt maritime commerce and that the tortfeasor's activity was

substantially related to traditional maritime activity. In doing so, the court of appeals looked *only* to the tortfeasor's activity, and it completely ignored the activity of the plaintiff. The activities giving rise to the drowning were locking through a recreational vessel on the Kentucky River *and* swimming. The fact that the activities of the United States and Roy Hardin are different is important. In *Sisson v. Ruby*, this Court stated: "We believe that, at least in cases in which all of the relative entities are engaged in similar types of activity . . . the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance for federal courts." *Sisson*, 497 U.S. at 367. Indeed, *Sisson* defined the relative activity in that case involving a boat fire as the storage and maintenance of a vessel at a marina on navigable waters, but took great pains to point out that all of the instrumentalities involved in the incident were engaged in a similar activity. *Sisson*, 497 U.S. at 365 n.3. The Court further stated that "different issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not." *Id.* at 365.

The United States argued (and the court of appeals agreed) that Roy Hardin's activities were irrelevant, and that the activities of the tortfeasor are the only proper subject of inquiry under the "substantial relationship" prong of the "connection to maritime activity test". Such a conclusion is based on an apparent misreading of this Court's decision in *Grubart*. In *Grubart*, the Court simply held that it was not necessary for *all* of the alleged tortfeasors to have engaged in activities substantially

related to traditional maritime activities as long as one of the tortfeasors was engaged in traditional maritime activity. *Grubart*, 513 U.S. at 541. The holding in *Grubart* did not suggest that a plaintiff's activities should be ignored. In *Grubart*, the activities of the plaintiff were not in question. In fact there were no activities of the plaintiff for the court to review since *Grubart* involved a claim for property damage by residents of downtown Chicago whose activities, if any, had no bearing on the occurrence in question. In this case, if there were no swimmers down river, the locking would have posed no hazard and there would have been no drowning. While it is certainly true that locks and dams are traditionally used in maritime activity, i.e., facilitating the transportation of commercial and recreational vessels, it is abundantly clear that swimming is not a traditional maritime activity, as long recognized in prior decisions of this Court. This Court should grant certiorari to clarify whether lower courts are to ignore the activities of the plaintiff and only focus upon the activities of a tortfeasor. There is a split in the lower court on whether the focus is only the tortfeasor's activity or whether the plaintiff's activities are to be considered as well. *Compare, e.g., Alderman v. Pacific N. Victor, Inc.*, 95 F.3d 1061, 1064 (11th Cir. 1996) and *Dimaso v. United States*, 1995 W.L. 21609 (N.D.Ill.).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the court grant her petition for writ of certiorari to address these important issues.

Respectfully submitted,

G. MURRAY TURNER
Counsel of Record
MULHALL TURNER COOMBS
& MALONE
440 South Seventh Street
Suite 300
Louisville, Kentucky 40203
(502) 584-6375

WILLIAM B. HOFFMAN
PAUL A. CASI, II
HOFFMAN & CASI
440 South Seventh Street
Suite 100
Louisville, Kentucky 40203
(502) 584-0404

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDNA AYERS, Administratrix of the Esate of Roy L. Hardin, deceased,	)	
Plaintiff-Appellant,	)	No. 00-5993
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort. No. 00-00011 – Joseph M. Hood, District Judge.

Argued: September 20, 2001

Decided and Filed: January 17, 2002

Before: NELSON and MOORE, Circuit Judges; KATZ*, District Judge.

COUNSEL

ARGUED: Paul A. Casi, II, HOFFMAN & CASI, Louisville, Kentucky, for Appellant. Debra J. Kossow, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Appellee. **ON BRIEF**: Paul A. Casi, HOFFMAN & CASI, Louisville, Kentucky,

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

for Appellant. Debra J. Kossow, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Appellee.

OPINION

DAVID A. KATZ, District Judge. Plaintiff-Appellant Edna Ayers ("Ayers"), as administratrix of the estate of Roy L. Hardin ("Hardin"), filed suit under the Suits in Admiralty Act, 46 U.S.C.App. §§ 741-752 ("SAA") and the Federal Torts Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA") against Defendant-Appellee the United States. Ayers alleged that the negligent operation of Lock and Dam No. 2 ("Lock No. 2") on the Kentucky River by the U.S. Army Corps of Engineers ("Corps") led to the drowning death of decedent Hardin, Ayers' son. The United States filed a motion to dismiss. The district court held that the action came within its admiralty jurisdiction, was therefore barred by the statute of limitations, and granted the motion to dismiss. We affirm.

I. Background

Lock and Dam No. 2, located at mile 31 on the Kentucky River, is owned and operated by the United States through its agency, the Corps. Lock No. 2 consists of a lock, to allow vessel passage on the river, and a dam, to maintain a navigable water level. The area downstream of Lock No. 2, near Lockport, Kentucky, is a popular swimming area.

On August 3, 1997, Hardin was swimming approximately one hundred yards from the downstream discharge area of Lock No. 2, when the lock master began "locking through" two pleasure craft. "Locking through" the craft entailed opening the downstream discharge end of Lock No. 2, resulting in turbulence from the sudden and rapid release of water. Plaintiff alleges that this turbulence pulled Hardin under the water and caused him to drown. Plaintiff also alleges that the lock master negligently failed to warn others of his intent to operate Lock No. 2. Following Hardin's drowning, the two pleasure craft left Lock No. 2 and proceeded downstream on the Kentucky River without delay.

On June 28, 1999, Ayers filed an administrative claim for wrongful death with the Corps, pursuant to the FTCA. On July 19, 1999, an attorney for the Corps acknowledged receipt of the claim and stated that the matter would be investigated. On July 29, 1999, Ayers was informed by facsimile letter that the administrative claim had not been properly filed because it lacked necessary documents demonstrating authorization to file the claim. The facsimile also stated, "The claim has not been properly presented and the statute of limitations continues to run." In response to the Corps' facsimile, that same day Ayers sent a new administrative claim containing the proper authorization and recognizing that the six-month period for the United States' response to the claim would run from the date of the new claim.

There was no final disposition of Ayers' claim within the prescribed six-month period. On February 11, 2000, Ayers filed a Complaint in the United States District

Court for the Eastern District of Kentucky. In her Complaint, Ayers alleged only that her action arose under the FTCA. On June 7, 2000, Ayers filed an Amended Complaint alleging that her action arose under the FTCA or, in the alternative, under the SAA.

The United States filed a motion to dismiss for lack of jurisdiction. The district court, applying *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), held that Ayers' action was before the court pursuant to its admiralty jurisdiction under the SAA and that the suit was untimely due to Ayers' failure to file her complaint within the two-year period allowed by 46 U.S.C.App. § 745. The district court also rejected Ayers' argument that the SAA's limitations period was subject to equitable tolling. The district court granted the motion to dismiss, and Ayers' appeal to this court followed. In her appeal, Ayers claims that her action was timely brought under the FTCA, or, in the alternative, that equitable tolling of the SAA's limitations period is appropriate based on her filing of an administrative complaint coupled with representations allegedly made by Corps attorneys concerning the tolling of the statute of limitations.

II. Standard of Review

"A district court's dismissal of claims for lack of subject matter jurisdiction is reviewed de novo on appeal." *Good v. Ohio Edison Co.*, 149 F.3d 413, 418 (6th Cir. 1998) (citing *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 697 (6th Cir. 1996), *cert. denied*, 519 U.S. 818 (1996)).

III. Discussion

(A) Admiralty Jurisdiction

"Claims for which a remedy is available under [SAA] are not cognizable under FTCA." *Pearce v. United States*, 261 F.3d 643, 647 (6th Cir. 2001) (quoting *Estate of Callas v. United States*, 682 F.2d 613, 619 n.7 (7th Cir. 1982)); 46 U.S.C.App. § 740. "The [SAA] permits suits in admiralty against the United States '[i]n cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained.' " *Pearce*, 261 F.3d at 647 (quoting *Faust v. South Carolina State Highway Dep't*, 721 F.2d 934, 938 n.2 (4th Cir. 1983)).

Prior to 1972, the existence of admiralty jurisdiction was determined by the locality test. Where "the wrong occurred on navigable waters, the action was within admiralty jurisdiction; if the wrong occurred on land, it [wa]s not." *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 253 (1972). In *Executive Jet*, the Court held that a determination of admiralty jurisdiction required inquiry into the "relationship of the wrong to traditional maritime activity." *Id.* at 261. Later in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), the Court stressed that admiralty jurisdiction existed only where the tort "had a significant connection with traditional maritime activity." *Id.* at 674. The *Foremost* Court found that the "significant connection" requirement was satisfied by "[t]he potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty holds for navigation," *id.* at 675, despite

the fact that neither of the vessels involved in the *Foremost* collision was engaged in commercial activity. Thereafter, in *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court held that maritime jurisdiction was appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. *See id.* at 363-367.

The Supreme Court most recently addressed admiralty jurisdiction in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). In *Grubart*, the Court held that admiralty jurisdiction existed over claims concerning flooding of buildings in downtown Chicago; the flooding had allegedly resulted after a crane situated on a barge on the Chicago River was used to drive piles into the riverbed above a tunnel. *See id.* at 529. The *Grubart* Court applied the *Sisson* test and stated that "[A] party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity." *Id.* at 534.

To determine if the location requirement has been satisfied, a court examining jurisdiction "must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Id.* Where there is some dispute as to the causation of an injury, a court may look to general tort principles of "proximate cause." *Id.* at 536-37.

The "connection test" requires a two-part inquiry. First, the court is required to " 'assess the general features of the type of incident involved' to determine whether

the incident has 'a potentially disruptive impact on maritime commerce.' " *Grubart*, 513 U.S. at 534 (quoting *Sisson*, 497 U.S. at 363, 364 n.2) (internal citations omitted). This assessment must be made by means of "a description of the incident at an intermediate level of possible generality." *Grubart*, 513 U.S. at 538. Having characterized the incident, we are then required to ask "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." *Id.* at 539.

To satisfy the second prong of the "connection test," the court "must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534 (quoting *Sisson*, 497 U.S. at 365, 364 and n.2)). That is, the court "ask[s] whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart*, 513 U.S. at 539-40. We apply *Grubart* below.

(B) The Location Requirement

The parties do not dispute that the portion of the Kentucky River in which Hardin was swimming when he drowned constitutes a navigable waterway, nor do they dispute that the lock master was "locking through" two pleasure craft just prior to Hardin's accident. Appellant argues, however, that these facts are insufficient to satisfy the location requirement for a number of reasons.

Appellant claims that the SAA requires that a vessel be involved in the commission of the tort. The SAA provides, in pertinent part, "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained. . . . " 46 U.S.C.App. § 742. The plain language of the statute states that only "private person or property" is necessary, so long as an action in admiralty might otherwise be maintained. Appellant's argument is therefore without merit.

Appellant also contends that because the lockmaster was on land when he activated the mechanism to release the water from the lock, this case should be characterized as a land-based tort that has caused injury on a navigable waterway. In effect, Appellant is asking this court to entertain an argument similar to that advanced in *Executive Jet*, in which the Supreme Court "refused to enter into a debate over whether the tort occurred where the plane had crashed and been destroyed (the navigable waters of Lake Erie) or where it had struck the sea gulls (over land)." *Sisson*, 497 U.S. at 361 (citing *Executive Jet*, 409 U.S. at 266-67). To engage in such a debate here would be to apply too mechanical an application of the locality test, something that the Supreme Court has recognized as neither "sensible" nor "consonant with the purposes of maritime law." *Grubart*, 513 U.S. at 533 (quoting *Executive Jet*, 409 U.S. at 261).

Finally, we note that Appellant's continued assertion that no vessel was involved in Hardin's drowning is disingenuous, at best. Although their connection with Hardin's drowning is clearly more tenuous than if he had

been struck by or had fallen from one of the craft, Appellant does not dispute that the lockmaster activated Lock No. 2 to allow passage of two pleasure craft.[1] It would therefore be unreasonable for Appellant to assert that Hardin's drowning was entirely unrelated to watercraft.

The locality prong of the test for admiralty jurisdiction has been satisfied. Not only was Hardin drowned in navigable waters, but also the instrumentality that Appellant suggests caused the drowning (Lock No. 2) was located in navigable waters.

(C) The Connection Requirement

In its initial step, the "connection test" requires that we characterize the circumstances resulting in Hardin's death with some "intermediate level of generality." Here the incident may appropriately be characterized as a drowning which occurred a short distance downstream from a lock on navigable waters. So characterized, it is clear that there was some potential effect on maritime commerce. Barring immediate recovery of the deceased, a drowning requires vessels to engage in some rescue and recovery effort, and if such an effort were to occur immediately downstream from a lock, then some not-insignificant interruption of commercial activity might result.

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[1] Appellant even states that such is the case in her Amended Complaint: "Such negligence included but was not necessarily limited to the sudden and rapid release of a large volume of water while transporting vessels through such Lock No. 2." (Apx. at 50).

This potential interruption is sufficient to satisfy the first part of the "connection test."[2]

The second enquiry in the "connection test" requires examination of whether the tortfeasor's activity was substantially related to traditional maritime activity. *See Grubart*, 513 U.S. at 539. There can be no reasonable dispute that the operation of a lock is a traditional maritime activity. *See, e.g., Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932) (vessel sank while approaching a lock); *The Montello*, 87 U.S. 430 (1874) (recognizing that locks, dams, and canals allow navigation of otherwise unnavigable waters).

Both the location and connection requirements for admiralty jurisdiction are present in this case. The district court was therefore correct in its determination that the exclusive remedy for Appellant's complaint is governed by the SAA.

(D) Statute of Limitations

Actions under the SAA are subject to a two-year statute of limitations. 46 U.S.C.App. § 745. Failure to bring an action under the SAA within two years following the occurrence of an injury will deprive federal courts of jurisdiction to hear the action. *See McMahon v. United*

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[2] In her brief, Appellant gives numerous reasons why the drowning did not result in any interruption of maritime commercial activity. The points raised by the Appellant are not relevant, however, because the test considers not what commercial disruption resulted, but what *potential* for disruption existed. *See Grubart*, 513 U.S. at 538.

States, 342 U.S. 25 (1951); *States Marine Corp. of Delaware v. United States*, 283 F.2d 776, 778 (2d Cir. 1960). Appellant's Complaint alleges that Hardin drowned on August 3, 1997. The Complaint was filed on February 11, 2000, and amended to include claims under the SAA on June 7, 2000. Appellant's claim falls outside the two-year limitations period and is therefore barred.

(E) Equitable Tolling

Appellant argues that in the event admiralty jurisdiction exists, the United States should be barred from asserting a statute of limitations defense by operation of equitable tolling. She contends that tolling is appropriate both because the United States affirmatively represented that the administrative claim filed pursuant to her FTCA action tolled the statute of limitations and because her failure to timely file an admiralty action was not caused by "garden variety neglect," but instead resulted because her claim involved an issue of admiralty jurisdiction that was one of first impression in this circuit.

Equitable tolling allows an action to proceed despite its having been brought outside the statute of limitations when there exist exceptional circumstances that have prevented timely filing of the action through no fault of the Plaintiff. *See Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998). Although equitable tolling may be applied in suits against the government, courts will only do so "sparingly," and not when there has only been "a garden variety claim of excusable neglect." *Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 96 (1990).

Appellant's claim that equitable tolling should be applied because she was misled by the United States' representations is without merit. It is well-established that the filing of an administrative claim under the FTCA will not toll the limitations period for an action under the SAA. *See McMahon*, 342 U.S. at 27; *see also Bo ell v. United States Dep't of Defense*, 735 F.2d 755, 757 (3d Cir. 1984). Furthermore, there is no allegation that a representative of the United States ever misled Appellant as to her admiralty claim. In her brief to this Court, the Appellant states, "The first time admiralty jurisdiction was raised and the two-year statute of limitations was asserted as a defense was in response to the Appellant's Complaint." (Appellant's Brief at 28).

Appellant's contention that she should be excused from the consequences of her untimely filing because the existence of admiralty jurisdiction in this case was an unsettled issue is also not well-taken. Diligent research was likely to have revealed not only the existence of a possible claim under the SAA, but also that the limitations period for that action would most likely not be tolled by the filing of Appellant's administrative claim. Had Appellant any doubt as to whether her action was properly brought under the FTCA or the SAA, she was free to include in her initial complaint requests for relief under both statutes. FED. R. CIV. P. 8(a). Contrary to the suggestion of Appellant at oral argument, such alternative pleadings are not disfavored.

The district court's decision not to allow equitable tolling of the SAA's statute of limitations was correct and will be affirmed.

IV. Conclusion

For the foregoing reasons, we hold that the Appellant's suit is barred due to her failure to file within two years of the alleged tortious activity as required by the Suits in Admiralty Act. The decision of the district court granting the motion to dismiss is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5993

EDNA AYERS, Administratrix of the Estate of Roy L. Hardin, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before: NELSON and MOORE, Circuit Judges; KATZ, District Judge.

JUDGMENT

(Filed Jan. 17, 2002)

On Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting the motion by defendant United States of America to dismiss is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 00-11
EDNA AYERS, ADMINISTRATRIX OF
THE ESTATE OF ROY L. HARDIN,
DECEASED, PLAINTIFF,

V. **MEMORANDUM OPINION AND ORDER**

UNITED STATES OF AMERICA, DEFENDANT.

(Filed June 28, 2000)

* * *

The defendant, United States of America, has moved to dismiss for lack of jurisdiction [Record No. 4]. The plaintiff has responded [Record No. 7] and the defendant has replied [Record No. 10]. This matter is ripe for review.

Factual Background

The plaintiff alleges that the decedent drowned on August 3, 1997, as a result of the U.S. Army, Corps of Engineers' negligent or wanton operation of Lock and Dam No. 2, located at mile 31 on the Kentucky River. Decedent and a friend were attempting to swim across the river. Decedent is alleged to have drown when a sudden and rapid release of water moved downstream as vessels were being transported through the lock.

Plaintiff filed a Federal Tort Claim for Wrongful Death with the United States Department of the Army, Army Corp of Engineers on June 28, 1999. On July 19, 1999, Jennifer Payton, Assistant District Counsel for the

Department of Army Engineer District, sent a letter acknowledging the receipt of the plaintiff's claim and stating that the matter would be investigated. On July 29, 1999, another letter was received by facsimile. This one was from Karen G. Shulman, attorney advisor for the Department of Army, U.S. Army Claim Services Office of the Judge Advocate General, indicating that she had received a copy of the plaintiff's claim. However, Shulman noted that the submitted form needed to be signed by the representative of the estate and that the claim had not been properly presented and that the statute of limitations continued to run.

On July 29, 1999, Plaintiff's counsel executed the form with the proper signature and mailed it to the appropriate office with a letter that stated, "based upon your representation that the statute of limitations period has continued to run until the filing of this Amended SF 95, we will use today's date as the beginning of the six month period within which the government must act on claims, pursuant to the Federal Tort Claims Act." See Plaintiff's Exhibit 10. The plaintiff did not receive any further correspondence from the defendant. In addition, the plaintiff did not take any further steps to insure that the applicable statute of limitations had been tolled for this case.

After six months passed without further action, the plaintiff filed the complaint in this case on February 11, 2000. This filing took place over two years after the incident that led to the decedent's drowning.

Application of 46 U.S.C. §742

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company, 513 U.S. 527 (1995) outlines the issues and factors that must be examined in order to secure a finding that jurisdiction under 46 U.S.C. §742 is proper. The *Grubart* decision analyzes admiralty jurisdiction, and its application to various fact patterns. "A federal court's authority to hear cases in admiralty flows initially from the Constitution, which 'extend[s]' federal judicial power 'to all cases of admiralty and maritime Jurisdiction.' " *Id.*, at 531, quoting U.S. Const., Art. III, §2. While the traditional test for admiralty jurisdiction explored a single issue of whether the tort occurred on navigable waters, the current analysis requires the Court to review the interaction between a number of factors. *Id.* at 531-532.

First, the Court must determine that the tort occurred on navigable waters. Then, the Court must conclude that the type of incident involved could have a potentially disruptive impact on maritime commerce. Finally, the Court must find that the character of the activity giving rise to the incident shows a substantial relationship to maritime activity. *Id.* If all three factors are present, admiralty jurisdiction is appropriate.

In the case at bar, the factual circumstances indicate that admiralty jurisdiction is the exclusive means of recovery for the plaintiff. First, the parties agree that the tort occurred on navigable waters. Lock and Dam 2 are located at mile 31 of the Kentucky River. The alleged tortfeasor's actions took place on this lock and dam. In addition, the decedent was attempting to swim across the Kentucky River when he drowned. Therefore, both the

tortuous conduct, and the resulting damage, occurred on the navigable waters of the Kentucky River which is maintained at a depth of six feet in order to facilitate vessel passage.

Second, the type of incident involved in this case had a potentially disruptive impact on maritime commerce. As this "pronge [goes] to the potential effects, not to the 'particular facts of the incident' ", Defendant need not show that commerce was actually impacted. *Id.* at 538.

In her response, Plaintiff alludes to the fact that vessels in the lock were detained due to this incident. Although there is no indication that the vessels detained in this case were merchant vessels, the incident had the potential to disrupt commerce. In addition to the delay of the actual vessels attempting to pass through the lock at the time of the accident, search and recovery efforts also have the potential of disrupting commerce. Incidents of drowning in a swimming accident are typically followed by an intense manhunt in an attempt to recover the swimmer's body. The passage of merchant vessels through the search area would disrupt such a recovery, and the search itself would also disrupt the flow of commerce. Therefore, an incident such as this one has a potentially disruptive impact on maritime commerce.

Finally, the general character of the activity giving rise to the incident shows a substantial relationship to maritime activity. In this prong of the analysis, the Court asks "whether a tort feasor's activity, commercial or non-commercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the

reasons for applying special admiralty rules would apply in the suit at hand." *Id.* at 539-540.

The operation of a lock and dam is essential to maritime commerce. Without the system of locks and dams, many rivers would not be navigable. Therefore, the operation of the lock and dam in this case is an activity traditionally subject to admiralty law. In fact, the Seventh Circuit tried a case under the jurisdiction of admiralty law where the government was charged with "negligence in the operation and maintenance of Lock and Dam No. 8". *Estate of Callas v. United States*, 682 F.2d 613, 619 (7th Cir. 1982). The Seventh Circuit specifically held that, "[t]he district court thus acted correctly when it dismissed the FTCA counts of the complaint" as "[c]laims for which a remedy is available under the SIAA [46 U.S.C. §742] are not cognizable under the FTCA." *Id.* at FN7. Therefore, as the factual scenario presented by the negligent or wanton operation of a lock and dam have a substantial relationship to maritime activity, the case at bar is under the exclusive jurisdiction of 46 U.S.C. §742.

Statute of Limitations

This cause of action falls under 46 U.S.C. §742 which governs suits in admiralty for libel in personam. This statute is the exclusive remedy for cases falling within its scope. Furthermore, this action cannot be considered under the Federal Tort Claims Act if 46 U.S.C. §742 governs. *See Graves v. United States*, 872 F.2d 133 (6th Cir. 1989).

This case was filed on February 11, 2000, more than two years after the cause of action arose. 46 U.S.C. §742

has a two year statute of limitation, 46 U.S.C. App. §745, which cannot be tolled with the filing of an administrative claim. *McMahon v. United States*, 342 U.S. 25 (1951). The filing of an administrative claim is not a prerequisite to the filing of an action under 46 U.S.C. §742. Plaintiff apparently believed that her claim was governed by the Federal Tort Claims Act ("FCTA") and proceeded to secure filings in an attempt to toll the statute of limitations under that Act. Equitable tolling principles do not save a claim that has been lost due to a "garden variety claim of excusable neglect." *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 96 (1990). Therefore, despite Plaintiff's administrative filing under the Federal Tort Claims Act, the statute of limitations for 46 U.S.C. §742 continued to run untolled.[1]

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[1] Plaintiff contends that this cause of action is subject to equitable tolling as Shulman failed to respond to Plaintiff's letter dated July 29, 1999. Plaintiff's letter indicated that Plaintiff intended the filing of Form 95 to toll the applicable statute of limitations. The fact that Plaintiff's attorney was incorrect in this assumption does not obligate the defendant to respond in an effort to correct this error.

The defendant made no affirmative gestures or responses that would indicate that the statute of limitations was being tolled. While Shulman's letter dated July 29, 1999 indicated that the incorrect filing of Form 95 created a situation where the statute of limitations would continue to run, the letter did not indicate that the proper filing of Form 95 would toll the statute of limitations.

Equitable tolling is an extreme remedy that is not to be utilized in cases involving neglect. *Irvin*, 498 U.S. at 96. If Plaintiff had more fully investigated her claim, she could have filed a claim in this Court prior to the expiration of the statute of limitations. Therefore, as the defendant did not intentionally

Conclusion

Although the factual events leading up to the filing of this complaint are heartbreaking, this Court finds that the case law on this issue is clear, and cannot be circumvented. Even though the decedent was not on board a vessel at the time of the accident, admiralty jurisdiction clearly governs this action as the negligent operation of the lock and dam fall within the guidelines of admiralty law. It is unfortunate that Plaintiff's administrative filings were insufficient to toll the statute of limitations, however, this case does not present the extreme factors required for the application of equitable tolling. While the Court sympathizes with the plaintiff's tragic loss, this case must be dismissed. The statute of limitations clearly defines the application of law in this case.

IT IS HEREBY ORDERED that the motion to dismiss for lack of jurisdiction be, and the same hereby is, **GRANTED**.

This the 27th day of June, 2000.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

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and affirmatively mislead the plaintiff, who had a full opportunity to file pleadings within the statutory period, the doctrine of equitable tolling will not be applied to this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 00-011
EDNA AYERS, ADMINISTRATRIX OF THE ESTATE OF ROY L. HARDIN, DECEASED, PLAINTIFF,

V. **JUDGMENT**

UNITED STATES OF AMERICA, DEFENDANT.

(Filed June 28, 2000)

* * *

In accordance with the Memorandum Opinion and Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, **DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET.**

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT.**

(3) That all scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY.**

(4) That this Order is **FINAL AND APPEALABLE** and **THERE IS NO JUST CAUSE FOR DELAY.**

This the 27th day of June, 2000.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: